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No. 89-1922

In the Supreme Court of the United States

OCTOBER TERM, 1990

PAMILA WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's attorney had an actual conflict of interest that adversely affected his performance at trial because he represented both petitioner and one of her co-defendants.

2. Whether petitioner is entitled to automatic reversal of her convictions because the district court did not inquire into the joint representation or inform petitioner of her right to separate counsel, as required by Fed. R. Crim. P. 44(c).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is unpublished, but the decision is noted at 897 F.2d 530 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1990. The petition for a writ of certiorari was filed on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and two counts of interstate transportation of securities taken by fraud, in violation of 18 U.S.C. 2314. She was sentenced to two concurrent terms of three years' imprisonment, to be followed by a five year term of probation on the third count. She also was ordered to make restitution in the amount of $31,938. Pet. App. 25a-26a. The court of appeals affirmed. Pet. App. 1a-24a.

1. The evidence at trial is summarized in the opinion of the court of appeals. Pet. App. 2a-3a, 12a. It established that petitioner participated in an arson scheme, pursuant to which the participants would defraud insurance companies by setting fire to residences in the Detroit area in order to collect insurance proceeds. Co-defendant Anders Migdaleck, a licensed contractor and owner of Town and Country Builders and Anders Construction Company, organized the arson scheme and used the insurance proceeds to pay the participants. Petitioner arranged through her cousin, co-defendant Michael White, to have her house set on fire. Before the fire, petitioner had Willie Weems, the arsonist, review her insurance policy to make sure that the property was adequately insured, and petitioner paid Weems the deposit he required to assure that she was committed to the plan. *Id.* at 12a. Following the fire, petitioner attended a meeting with Migdaleck, Weems, White, and Albert Meredith, Sr. At that meeting, petitioner and the other participants received their commissions from Migdaleck, and petitioner entered into a contract with Town and Country Builders (which she later

cancelled) to repair her fire-damaged house. *Ibid.*; 1 Tr. 44, 46-47.

2. Petitioner and White were represented at trial by the same attorney, and they offered the common defense of nonparticipation in the arson scheme. Petitioner did not object to the joint representation, and the district court did not inquire into it or inform petitioner of her right to separate counsel, as required by Fed. R. Crim. P. 44(c).[1]

On appeal, petitioner took issue for the first time with the joint representation, contending that her attorney had an impermissible conflict of interest. She pointed to her attorney's failure to cross-examine government witnesses Weems and Meredith, whose testimony, she argued, made viable the defense of shifting the blame to White. The court of appeals rejected that claim. It first noted that petitioner had conceded on appeal that the trial court's failure to make the required inquiry under Rule 44(c) did not in itself require automatic reversal. Pet. App. 11a. The court further concluded that petitioner had failed to demonstrate an actual conflict of interest. It discerned no likelihood that a blame-shifting defense would have succeeded or that petitioner stood to gain by abandoning the defense of noninvolvement pursued by her trial counsel, since Meredith and Weems both testified about petitioner's involvement and she did not contend that co-defendant White would have exculpated her. *Id.* at 12a-13a.

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[1] Rule 44(c) provides that in cases of joint representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation."

ARGUMENT

1. Petitioner contends (Pet. 6-9) that she was denied her Sixth Amendment right to the effective assistance of counsel because her trial attorney had a conflict of interest arising from his joint representation of petitioner and White. We note as an initial matter that objections to trial counsel's performance should ordinarily be presented in the first instance to the district court, in a motion under 28 U.S.C. 2255, so that a record may be developed and appropriate findings made.[2] Here, because petitioner raised her Sixth Amendment claim for the first time on appeal, no record has been developed on petitioner's claim, including findings regarding the viability of the defense petitioner now asserts her attorney should have pursued and the attorney's reasons for not pursuing it. In any event, on the present record the court of appeals correctly rejected petitioner's conflict-of-interest claim.

The legal principles governing conflict-of-interest claims are well established and are not disputed by petitioner. Joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Burger* v. *Kemp*, 483 U.S. 776, 783 (1987) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978)). In order to establish a constitutional violation, a defendant who raised no objection at trial must show that his attorney " 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Burger* v. *Kemp*, 483 U.S. at 783 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984)); see also *Cuyler* v. *Sullivan*, 446 U.S. 335,

[2] See our Brief in Opposition, No. 89-1040, in *Chappell* v. *United States*, vacated and remanded, 110 S. Ct. 1800 (1990).

346-347, 350 (1980). The courts generally presume that counsel "is fully conscious of the overarching duty of complete loyalty to his or her client," and they "appropriately and 'necessarily rely in large measure upon the good faith and good judgment of defense counsel.'" *Burger* v. *Kemp*, 483 U.S. at 784 (quoting *Cuyler* v. *Sullivan*, 446 U.S. at 347).

An actual conflict of interest is present as a result of joint representation "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." *United States* v. *Benavidez*, 664 F.2d 1255, 1260 (5th Cir.) (quoting *Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1972)), cert. denied, 457 U.S. 1121 (1982). See also *United States* v. *Carter*, 721 F.2d 1514, 1536 (11th Cir.), cert. denied, 469 U.S. 819 (1984); *Brien* v. *United States*, 695 F.2d 10, 15 (1st Cir. 1982). In an attempt to establish such an actual conflict of interest, petitioner argues that, because of the joint representation, her attorney failed to adopt a strategy of shifting the blame to White. She claims that a blame-shifting defense would have been viable based on Meredith's testimony that she was initially reluctant to become involved in the arson scheme, Weems' testimony that he never spoke to her face-to-face prior to the fire, and evidence that she ultimately cancelled her repair contract with Town and Country Builders.

The court of appeals correctly concluded that petitioner did not have a plausible blame-shifting defense. First, although Meredith did testify that petitioner initially wanted no part of the arson scheme, he also testified about her attendance at the post-fire meeting, her receipt of a commission payment from Migdaleck

for her participation in the scheme, and her signing of the repair contract with Town and Country Builders. Pet. App. 12a; 1 Tr. 44-45. Meredith's testimony therefore provided no basis for a defense of shifting the entire blame to White. Nor did petitioner have anything to gain from highlighting her failure to have a face-to-face meeting with Weems prior to the fire. Weems testified that he explicitly warned petitioner over the telephone not to meet with him and that, during the same conversation, she arranged to have Weems review her insurance policy and to pay Weems a deposit to demonstrate her commitment to the scheme. Pet. App. 12a; 5 Tr. 542-544. Finally, evidence of petitioner's cancellation of the repair contract, which occurred after the fire and after her receipt of a commission from Magdaleck, would not have supported a viable blame-shifting defense.[3]

The government did present a stronger case against White than against petitioner. But, as the court of appeals observed, that "does not diminish the force

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[3] In *Cuyler* v. *Sullivan*, 446 U.S. at 349-350, the Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." The decision below is consistent with that principle, because the court of appeals nowhere indicated that prejudice is a component of a conflict-of-interest claim. The court did note petitioner's failure to challenge the sufficiency of the evidence against her, but only to bolster its conclusion that petitioner did not have a plausible defense simply because White was more blameworthy than she was. Pet. App. 13a. Accordingly, contrary to petitioner's contention (Pet. 9), the decision below does not conflict with *United States* v. *Romero*, 780 F.2d 981 (11th Cir. 1986). There, although the court did not require a showing of prejudice in order to establish a conflict of interest, it did require a showing that the defense precluded by the alleged conflict of interest was "feasible." *Id.* at 986.

of the evidence that [petitioner] was identified as a participant in the scheme to set the home she owned on fire." Pet. App. 12a. In short, the court of appeals, applying established legal principles governing conflict-of-interest claims, correctly concluded that petitioner did not stand to gain by abandoning her common defense with White and pursuing a defense that attempted to shift the entire blame to White.[4] Petitioner therefore has not shown the existence of an actual conflict of interest. Nor has she shown that any such conflict adversely affected counsel's performance at trial. The witnesses whom she says counsel should have specifically cross-examined testified to the involvement of both White and petitioner. Petitioner has pointed to nothing to suggest that their testimony on cross-examination would have supported the notion that petitioner was not involved in the scheme at all. The court of appeals' fact-bound determination on the present record therefore does not warrant review by this Court.

2. Petitioner next contends (Pet. 9-13) that even if she failed to establish the existence of an actual conflict of interest, her convictions should be reversed because of the district court's failure to conduct an inquiry under Fed. R. Crim. P. 44(c). This submission is inconsistent with petitioner's concession at

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[4] Petitioner cites *United States* v. *Cirrincione*, 780 F.2d 620 (7th Cir. 1985), for the proposition that "arson cases are classical examples for conflict of interest where the defense strategy of shifting the blame is most often employed." Pet. 8. Nothing in *Cirrincione* suggests that actual conflicts of interest or blame-shifting defenses are more common or viable in arson cases, and indeed the *Cirrincione* court found no conflict. 780 F.2d at 628-631. Likewise, on the facts of this case, a blame-shifting defense could not realistically have succeeded in exonerating petitioner.

oral argument in the court of appeals that the district court's failure to follow Rule 44(c) did not require automatic reversal of her convictions. See Pet. App. 11a. It also is without merit.

The courts that have addressed the issue have uniformly held that the failure to comply with Rule 44(c) requires reversal only if the defendant can show that the noncompliance resulted in a Sixth Amendment violation—that is, that an actual conflict of interest adversely affected his lawyer's performance. *United States* v. *Arias*, 678 F.2d 1202, 1205 (4th Cir.), cert. denied, 459 U.S. 910 (1982); *United States* v. *Holley*, 826 F.2d 331, 333 (5th Cir. 1987), cert. denied, 485 U.S. 960 (1988); *United States* v. *Benavidez*, 664 F.2d at 1258-1259; *United States* v. *Bradshaw*, 719 F.2d 907, 915 (7th Cir. 1983); *United States* v. *Mooney*, 769 F.2d 496, 499 (8th Cir. 1985); *United States* v. *Crespo de Llano*, 838 F.2d 1006, 1013 (9th Cir. 1987); *United States* v. *Burney*, 756 F.2d 787, 791 (10th Cir. 1985); *United States* v. *Romero*, 780 F.2d 981, 985 (11th Cir. 1986); *United States* v. *Alvarez*, 696 F.2d 1307, 1309 (11th Cir.), cert. denied, 461 U.S. 907 (1983). Petitioner failed to carry that burden.

The decisions rejecting the automatic reversal rule are correct. As the Advisory Committee Note to the 1979 Amendment explains (18 U.S.C. App. at 823), Rule 44(c) was adopted to "establish[] a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel." The Rule thus was designed as a "prophylactic measure, compliance with which would reduce the number of appeals by defendants who initially

desired joint representation but later claimed that such representation was not in their best interests." *United States* v. *Crespo de Llano*, 838 F.2d at 1013. The Rule's purpose of avoiding conflicts of interest that could lead to post-conviction claims would not be served by a requirement of automatic reversal. As the Fifth Circuit observed, "it would be a distortion of the purpose of Rule 44(c) to hold that failure to comply with the rule is in itself reversible error without requiring any showing that [the] defendant has been denied the Sixth Amendment right that the rule was designed to protect." *United States* v. *Benavidez*, 664 F.2d at 1259. Indeed, the Advisory Committee Note to the 1979 Amendment is explicit on this point: "The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." 18 U.S.C. App. at 826.

Petitioner's reliance (Pet. 13) on *Wood* v. *Georgia*, 450 U.S. 261 (1980), is unavailing. In *Wood*, the Court held that the likelihood of a conflict of interest was sufficiently apparent at the time of the defendants' probation-revocation hearing to impose on the trial court a duty to inquire further. *Id.* at 272. Because such an inquiry had not been conducted, the Court remanded the case to the trial court with instructions to hold a new revocation hearing if it determined that an actual conflict of interest existed and that there was no valid waiver of the right to separate counsel. *Id.* at 273-274. The Court did not require automatic reversal because of the failure to conduct an inquiry. Accordingly, far from supporting petitioner's automatic-reversal position, *Wood* v. *Georgia* undermines it. Furthermore, as we have explained, there was no likelihood of an actual conflict of interest apparent in this case that would have im-

posed on the court the duty of inquiry recognized in *Wood* v. *Georgia*.

Finally, petitioner notes that several courts of appeals have held that the government bears the burden of showing the absence of prejudice when the trial court has failed to conduct an inquiry into joint representation. Pet. 11 (citing *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976), and *United States* v. *Foster*, 469 F.2d 1 (1st Cir. 1972)).[5] Those decisions, however, predated both *Cuyler* v. *Sullivan* and the adoption of Rule 44(c), and the courts there imposed the burden-shifting principle under their supervisory powers, not under the Sixth Amendment or Rule 44(c). Interpreting the Sixth Amendment, *Cuyler* v. *Sullivan* plainly requires a defendant who has raised no objection at trial to demonstrate an actual conflict of interest. By contrast, shifting the burden to the government "would result in a presumption of conflict clearly at odds with the holding and reasoning of *Cuyler* [v. *Sullivan*] and the decisions interpreting [Rule] 44(c)," and "allowing a defendant to benefit by remaining silent at trial would undercut the policy of early conflict determination which underlies Rule 44(c)." *United States* v. *Burney*, 756 F.2d at 792 n.5.

Although the First and Second Circuits have recited the burden-shifting formulation in subsequent cases,[6]

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[5] Petitioner also cites (Pet. 11) *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203 (3d Cir. 1973), for this proposition, but that decision did not announce such a rule.

[6] See *United States* v. *Mazzaferro*, 865 F.2d 450, 454 (1st Cir. 1989); *United States* v. *Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987), cert. denied, 486 U.S. 1034 (1988); *United States* v. *Edwardo-Franco*, 885 F.2d 1002, 1007 (2d Cir. 1989).

the decision by those two courts to carry forward that feature of their prior supervisory-power rule after the decision in *Cuyler* v. *Sullivan* and the adoption of Rule 44(c) more than ten years ago does not warrant review. There is no indication that this narrow issue is of substantial importance, since district courts are now sufficiently familiar with Rule 44(c) that failures to follow it are rare, and even where a failure occurs, there is no reason to believe that the allocation of the burden of proof has a decisive effect in very many cases.

Moreover, in the court of appeals, petitioner proposed a burden-shifting approach only in passing, and it was narrower than the one she now apparently proposes. In the court of appeals, petitioner conceded (C.A. Br. 13-14) that she should be required to show that her counsel had an actual conflict of interest, and that only then would there be a presumption of prejudice. As we have explained above, petitioner has not carried her threshold burden under the very approach she proposed below, because she has not established the existence of an actual conflict of interest, much less one that adversely affected counsel's performance on her behalf at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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